No. 567

In the Supreme Court of the United States

OCTOBER TERM, 1952

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v.

RCA COMMUNICATIONS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Solicitor General on behalf of the Federal Communications Commission prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on November 6, 1952.

OPINION BELOW

The opinion of the court of appeals (R. 696) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1952 (R. 708). Certification

of opinion and judgment has been stayed by the court of appeals until January 26, 1953. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the Federal Communications Commission, in licensing radiotelegraph circuits pursuant to the Communications Act of 1934, is precluded from authorizing a competing direct radiotelegraph circuit unless it is affirmatively established that the competition to be created will result in better service, lower rates, or some other definitely ascertainable benefit.

STATUTE INVOLVED

The pertinent sections of the Communications Act of 1934, as amended, 48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.* are set forth in the Appendix, *infra*, pp. 17-18.

STATEMENT

This petition seeks review of a judgment reversing a decision and order of the Federal Communications Commission which granted the applications of Mackay Radio and Telegraph Company, Inc. (hereinafter called Mackay) to provide direct radiotelegraph service between the United States and Portugal, and to provide radiotelegraph service between the United States and The Netherlands, both directly and via relay at Tangier.

The above applications, together with an application by Mackay to provide direct radiotelegraph service between the United States and Surinam, were the subject of a full hearing before the Com-

mission.[1] The grant of these applications was opposed by respondent RCA Communications, Inc. (hereinafter sometimes called RCAC), which at all times during the course of the proceeding operated the only direct radiotelegraph service between the United States and each of the three points in issue. Cable service to each of the points was furnished by two other American carriers, either directly or through the services of connecting carriers.[2]

Mackay contended before the Commission that the statutory standard, "public interest, convenience, or necessity", of the Communications Act[3] embraces and expresses the national policy in favor of competition, and that this policy would be frustrated unless the Commission authorized Mackay to enter into competition with respondent at the points at issue. Respondent argued, *inter alia*, that granting the Mackay applications would not

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[1] The hearing resulted in the rendition of an initial decision. Exceptions thereto were filed by the parties, and a final decision was issued by the Commission (R. 550-654) after consideration of the initial decision, the exceptions, and oral argument on the exceptions. The Surinam application was denied by the Commission, for reasons discussed *infra*, p. 6.

[2] Cable service to Portugal and The Netherlands was furnished by The Western Union Telegraph Company and Commercial Cable Company. Cable service to Surinam was furnished by The Western Union Telegraph Company and by All America Cables and Radio, Inc. Western Union was a party to the proceedings before the Commission, but did not participate in the appeal from the Commission's decision. Both Commercial and All America are wholly owned subsidiaries of American Cable and Radio Corporation, which is also the parent company of Mackay.

[3] Section 309(a), 47 U.S.C. 309(a) Appendix, *infra*, p. 17).

result in more comprehensive service to the points involved, in the generation of new traffic, or in better or cheaper service. Respondent therefore urged that under these circumstances the Mackay applications should not be granted.

The Commission found that Mackay was legally,[4] technically, and financially qualified to render the service it proposed (R. 605, 628). It recognized that the capacity of existing telegraph facilities between the United States and the points involved was in excess of that required to handle present and expected traffic (R. 604). And it recognized that Mackay had not proposed lower rates or speedier or more comprehensive service than that available from RCAC (R. 605). It was found, however, that Mackay's proposed service would be superior to its indirect radio service and to the cable service then being furnished by Commercial Cable Company (R. 605-606). The Commission also found that competition between direct circuits is important to the maintenance of effective competition (R. 626), and that the grant of the Portugal and The Netherlands applications would introduce competition between direct radiotelegraph circuits and enhance competition generally (R. 607, 628),

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[4] The Commission concluded that granting the Portugal and The Netherlands applications would not bring Mackay or the American Cable and Radio System, of which it is a part, into violation of Section 314 of the Communication Act, 47 U.S.C. 314 (R. 615). That section, in pertinent part, prohibits common ownership and operation of cable and radiotelegraph facilities in international communication if the effect thereof may be to substantially lessen competition, restrain commerce, or create monopoly (See Appendix, *infra*, pp. 17-18).

with a corresponding beneficial effect (R. 623, 627).[5]

The Commission found that the volume of international telegraph traffic had increased greatly in recent years (R. 619), and that during this period there had been an increasing trend in international telegraph traffic toward the use of radio rather than cable (R. 620).[6] It further found that The Netherlands and Portugal are important traffic centers, each with a sufficient volume of traffic available to support an additional direct radiotelegraph circuit (R. 619, 629-630). The Commission carefully evaluated the probable financial effect on respondent of grants of the Mackay applications, and determined that even after such grants respondent would be able to operate its circuits to The Netherlands and Portugal at a profit (R. 579, 594). Moreover, the Commission found that the proposed grants to Mackay would not endanger the ability of respondent or that of the other carriers serving The Netherlands and Portugal to continue

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[5] In discussing the importance of competition as a consideration, the Commission said "Competition can generally be expected to provide a powerful incentive for the rendition of better service at lower cost. Those seeking the patronage of customers are spurred on to install the latest developments in the art in order to improve their services or products, and in order to enable them to reduce expenses and thereby lower their rates or prices. The benefits to be derived from competition should, therefore, not be lightly discarded" (R. 623).

[6] Foreign administrations, with whom American carriers must correspond, actively favor radiotelegraph circuits, in which they have a proprietary interest, rather than cable circuits from which they derive much less revenue (R. 606, 620).

to provide competitive service to those points or generally in the field of international telegraph communications (R. 607, 628-629). The Commission therefore concluded that it was reasonably feasible to have direct circuit radiotelegraph competition on these two routes, and granted Mackay's applications.[7]

With respect to the Surinam application, the Commission reached a contrary conclusion. It found that Surinam is a relatively unimportant traffic center, and concluded that the small volume of traffic between Surinam and the United States, when considered together with the fact that a grant of Mackay's application would result in an increase in the losses which RCAC was currently sustaining in the operation of its circuit to Surinam, precluded a grant of the application (R. 630).

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[7] Respondent argued that such a result would be inconsistent with a decision of the Commission rendered in 1936 denying Mackay's applications for a duplicate direct radiotelegraph service to Oslo, Norway. *In re Mackay Radio and Telegraph Co.*, 2 F.C.C. 592. This decision had been upheld by the court of appeals, *Mackay Radio and Telegraph Co.* v. *Federal Communications Commission*, 97 F. 2d 641 (C.A. D.C.). The Commission in its present decision pointed out that since the time of the *Oslo* case the volume of international telegraph traffic had increased to a point that even if Mackay's present applications were granted, there would be considerably more traffic per carrier available to the points here involved than was available to the carriers serving those points in 1936 (R. 619), and that there had been a strong trend to radio from cable since that time (R. 620). The Commission further noted that despite the *Oslo* decision, the Commission had not followed a "single circuit" policy in the intervening period since that decision was rendered (R. 621-622). On the contrary, the Commission had authorized competing services to be instituted in a variety of situations (R. 620-622).

The Commission's decision did not adopt either of the theoretical extremes open to it. On the one hand, it declined to accept, as its concept of "public interest," a "single circuit" policy under which only one carrier would be licensed to provide direct radiotelegraph service to any point (R. 627-628). On the other hand, the decision did not adopt a "duplicate circuit" policy under which competing services would be authorized regardless of the volume of traffic or effects of duplication upon the ability of existing carriers to render adequate service (R. 627). The Commission chose a middle course pursuant to which the national policy in favor of competition was deemed to be a factor in determining the "public interest", at least in situations in which it appears from the facts of record that competition is reasonably feasible in that there is a sufficient volume of traffic to support operations by both the existing carrier and a new carrier (R. 628-629).

On appeal by respondent, the court below, with one judge dissenting, reversed the decision of the Commission to authorize service to Portugal and The Netherlands.[8] The majority did not overturn any of the basic findings made by the Commission; indeed, it assumed for purpose of decision that competition with RCAC in handling

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[8] No appeal was taken from the denial of the Surinam application. Mackay's Portugal and Netherlands circuits are presently in operation, the court below having declined to stay the authorizations pending appeal, and the certification of opinion and judgment of the court reversing the Commission's orders having been stayed by it.

traffic to these points would be reasonably feasible, as that term was used in the Commission's decision (R. 698): Nevertheless, the majority held that the Commission does not have the discretion to authorize a duplicate, direct radiotelegraph circuit in the absence of a showing that such authorization will produce "better service or lower rates or any other public benefit" (R. 701).

Judge Prettyman, dissenting, characterized the central issue upon which the majority had ruled[9] as "whether the Commission can authorize a competitive service as a matter of policy where one is not actually needed * * *" (R. 703). With respect to this question Judge Prettyman concluded as follows:

> The Commission says that competition, whenever it is "reasonably feasible" is part of the public interest, convenience and necessity. By "reasonably feasible" the Commission seems to mean that the new service will not endanger the old.
>
> I think that, when existing traffic permits more than one carrier, and where the existence of a second carrier would not endanger the stability or the service of the existing carrier, competitive service may well be in the public interest. If that be so, then, where the necessary conditions are established, the ques-

[9] In the light of its disposition of the case, the majority of the court below did not reach the question of the validity of the Commission's determination that Section 314 of the Communications Act, 47 U.S.C. 314, would not be violated by the grants herein (R. 702). The dissenting judge expressly found this determination of the Commission valid (R. 705).

tion whether there should or should not be a second carrier is for the Commission to decide.

* * * *

In the present case the Commission made extensive findings, which I have summarized. They were amply supported in the record. They in turn support the ultimate finding that the competition of Mackay will not imperil the financial stability of RCAC. And that finding is ample support for the exercise of the judgment of the Commission that the presence of Mackay in the field will serve the public interest. [R. 703-705.]

SPECIFICATION OF ERRORS TO BE URGED

The court of appeals erred—

(1) In holding that the Commission does not have discretion to authorize a competing direct radiotelegraph circuit to a given point where competition is reasonably feasible unless it is proved that ascertainable specific public benefit will be derived from such service.

(2) In holding that where an applicant for authority to operate a competing direct radiotelegraph circuit does not propose lower rates or speedier or more efficient service than that already being rendered, the Commission's conclusion that long-term salutary effects may be expected to be derived from competition between carriers cannot be sustained.

(3) In reversing the decision of the Commission granting the applications of Mackay to communicate with Portugal and The Netherlands.

REASONS FOR GRANTING THE WRIT

1. The decision below establishes a far-reaching —and we believe erroneous—rule of law on a question of major importance in the administration of the Communications Act. The decision will also have a wide impact upon the weight to be given the factor of competition in the administration of all regulatory statutes which authorize administrative agencies to grant certificates of "public interest, convenience or necessity."

The decision of the court of appeals is tantamount to a holding that in the radiotelegraph field the Commission may authorize a competing service between two points only if the Commission finds, on adequate proof, that the authorization will result in concrete immediate benefits, as distinct from the long-run benefits of competition. Thus, the court held the Commission's decision defective in failing to include a finding that "the specific competition here in issue will produce better service or lower rates or any other public benefit" (R. 701). And it pointed to findings by the Commission which made it clear that the record here would not have warranted such an affirmative finding (R. 701; see R. 605). It is submitted that these rulings rest on a misapprehension of the applicable law.

There is no support in the Communications Act or decisions of this Court for the rule of law adopted by the court of appeals. Quite the opposite. In *McLean Trucking Co.* v. *United States*, 321 U.S. 67, the Court exhaustively delineated the special role of an administrative agency in weigh-

ing the various factors which go to make up the public interest. The *McLean* case sustained an approval by the Interstate Commerce Commission of a merger of motor carriers. The Court made it clear that the national policy in favor of competition reflected in the antitrust laws must be considered by the Commission in weighing the public interest (321 U.S. at 87). In upholding the Commission's conclusion that on the facts of the particular case the benefits of competition were outweighed by other considerations, the Court pointed out that the "complex task" of resolving opposing considerations of this character is a matter primarily for the administrative agency (*ibid*).

In discussing the standards which should guide an agency in weighing policies embodied in other statutes, the *McLean* decision pointed out that "The precise adjustments * * * will vary from instance to instance depending on the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement" of the particular statute the agency is administering (321 U.S. at 80). Congress has made its concern with competition in the radio communications field quite explicit. Section 313 of the Act (Appendix, *infra*, p. 17) in terms makes the antitrust laws applicable to radio communications.[10] Plainly the national policy in favor of competition reflected

[10] And see Sections 311, 314, 602(d), 47 U.S.C. 311, 314, 48 Stat. 1102. It is also significant that Congress has never even authorized the Commission to permit mergers of international telegraph carriers (including radio) although such a proposal has been presented to it in the past. See *e.g.* S. 2443, 77th Cong., 2d Sess.

in these laws is one of the factors which the Commission must consider in determining the public interest, convenience and necessity.

The decision below does not in terms exclude consideration of competition, but it adopts an artificial standard which in practical effect reaches the same result. It requires demonstration of that which, in the nature of things, is frequently not demonstrable. The antitrust laws are premised upon the judgment, grounded in long experience, that competition provides incentives to bring about the maximum development of an art, a constantly improving product or service, and low prices. We submit that the Commission properly may, as it has done here, accept that premise as a factor to be weighed in determining the "public interest", without requiring that the benefit to the public from competition be affirmatively and specifically established each time that authorization of a competitive service is resisted by a licensee covetous of its existing monopoly position.

The court below did not find that the Commission had improperly considered competition to the exclusion of other factors, and no such finding could be sustained. The Commission was well aware that "there may be occasions when 'competition between carriers may result in harm to the public as well as in benefit' ". *McLean* case, *supra*, 321 U.S. at 83-84. The Commission exhaustively considered all available evidence with relation to the present and potential traffic involved, the probable effects of the new service on existing carriers, and

the qualifications of the applicant. It granted two of the applications of Mackay before it; it denied the third.

Nor did the court below reject the Commission's basic findings; it assumed that those findings were correct but it rejected the Commission's concept of what serves "public interest, convenience or necessity." This concept may be briefly summarized: Competition between radiotelegraph services is generally desirable. Accordingly, where only one such service exists, an additional service will ordinarily be in the public interest if competition is reasonably feasible, *i.e.*, where there is a sufficient volume of traffic to support both the existing carrier and an additional carrier.[11] With respect to the authorizations for service to Portugal and The Netherlands here approved, the record established that these authorizations would introduce competition between direct radiotelegraph circuits and would enhance competition generally (R. 607, 628). And the Commission found that an adequate volume of traffic existed to support two services so that a grant would not endanger the ability of RCAC and the cable carriers to continue to provide adequate service (R. 628-629). This latter crucial requirement was not

[11] The Commission pointed out, however, that competition is only one of the elements to be considered. It said (R. 627): "* * * our discussion herein should not be interpreted as an indication that we are required, in all cases, to grant an application when the effect thereof will be additional competition. It does indicate, however, that competition is an important element in a determination of whether the public interest, convenience, or necessity would be served by a grant of an application which may be before us."

met with respect to Surinam; hence the Surinam application was denied (R. 630). Thus the Commission discharged the function peculiarly entrusted to it of determining whether particular authorizations are in the public interest in light of all relevant factors. The result of the reversal of the Commission's decision is the substitution of an inflexible, and we believe erroneous, rule of law for a case-by-case exercise of administrative judgment.

The court below relied principally upon its own prior decision in the so-called *Oslo* case in which a 1936 order of the Commission declining to authorize duplicate circuits was sustained. The *Oslo* case [*Mackay Radio and Telegraph Company* v. *Federal Communications Commission*, 97 F. 2d 641] correctly determined that nothing in the Communications Act requires the establishment of duplicate circuits as a matter of law and irrespective of the effects on existing services. Such a determination falls far short of establishing the proposition now adopted—that a grant of competing applications is unlawful unless it can be shown to result in some immediate, specific, ascertainable benefit. We believe that a careful reading of the *Olso* decision reveals, as the dissenting judge below pointed out, that there

> the question was whether competition is always necessarily in the public interest. The answer was "No". I agree with that answer to that question. The question here is whether competition is ever in the public interest. The

> answer, it seems to me, is "Yes". The nub of the matter is the amount and nature of the available and prospective business. If the business will support two operators, the regulatory authority has a wide discretion in determining whether to serve the public interest by drastic supervision of a single operator or to install an automatic self-regulator in the form of a competitor. [R. 704-705.]

In any event, the interpretation now placed upon the *Oslo* case by the court below cannot be sustained in the light of the subsequent *McLean* case, 321 U.S. 67, and the national policy in favor of competition which has been embodied in the Communications Act.

2. The decision below, if allowed to stand unreversed, will profoundly affect the course of regulation of the radiotelegraph industry. By precluding authorization of competing services unless there is an affirmative showing of *need* for such services, the decision goes far toward encouraging monopoly in this field. Once a carrier has been authorized to serve a particular point, it can provide facilities to handle all traffic to that point with a relatively slight capital expenditure.[12] If,

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[12] The small size of the capital investment required to render service in this field removes much of the argument against maintenance of competing services which is advanced in industries where duplicating services may be prohibitively expensive and therefore wasteful. In the instant case Mackay proposed to operate the circuits to The Netherlands and Portugal with equipment which was part of its existing plant (R. 574, 586).

the first carrier authorized renders adequate service, it is difficult, if not impossible, to demonstrate with mathematical precision the benefits which may be expected to flow from authorization of a competing service.

The issue which is presented here is fundamental to the role to be played by competition in a regulated industry. The Commission's decision applies the principle that competition is in the public interest if reasonably feasible. The decision below rules out application of this principle as a matter of law, and requires an affirmative showing in each case that competition will benefit the public. Thus the court's decision applies the principle that competition may not be authorized unless demonstrably beneficial. We submit that the question is one of real significance which should be definitively resolved by this Court.

CONCLUSION

The decision below misapplies the applicable provisions of the Communications Act of 1934, and it involves a question of federal law of far-reaching importance. It is respectfully submitted that the petition for certiorari should be granted.

WALTER J. CUMMINGS, JR.,
Solicitor General.

BENEDICT P. COTTONE,
General Counsel,
Federal Communications Commission.

JANUARY 1953.

APPENDIX

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. 151, et seq.

HEARINGS ON APPLICATIONS FOR LICENSES; FORM OF LICENSES; CONDITIONS ATTACHED TO LICENSES

Section 309 (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. * * *[13]

APPLICATION OF ANTITRUST LAWS

Section 313. All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. * * *

PRESERVATION OF COMPETITION IN COMMERCE

Section 314. After the effective date of this Act no person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting

[13] Editorial changes in this section were made subsequent to the issuance of the Commission's decision herein.

and/or receiving for hire energy, communications, or signals by radio * * * shall * * * directly or indirectly, acquire, own, control, or operate any cable or wire telegraph or telephone line or system between any place in any State, Territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, * * * if * * * the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce; * * *

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